In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1635

RICHARD E. KEISTER, JR., PETITIONER

v.

ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, an Army reservist, was ordered to active duty because of unsatisfactory participation in his reserve unit; specifically, he had absented himself without leave or authorization from the final six days of his required fifteen-day active duty training (Pet. App. 11). He subsequently claimed that his unauthorized departure was due to psychiatric difficulties. In accordance with Army Regulation AR 135-91, the

claim was investigated by the unit commander, found by him to be unjustified, and was then transmitted through the chain of command with the unit commander's request that petitioner be ordered to active duty. On March 12, 1971, after intermediate level approval of the unit commander's request, an Army Delay Appeal Board denied petitioner's administrative appeal and active duty orders issued.

Petitioner requested a medical discharge, also based on his alleged psychiatric condition. This request was similarly transmitted by his unit commander through the chain of command; action on the discharge request was deferred pending a medical examination at the Army reception station after petitioner's entry upon active duty (Pet. App. 12-13).[1]

On March 19, 1971, petitioner commenced the present habeas corpus proceedings in the United States District Court for the Eastern District of Pennsylvania. He sought to enjoin the Army from enforcing its activation orders and to compel final affirmative action on his request for a medical discharge. The district court (Pet. App. 11-25) denied relief, and the court of appeals (Pet. App. 2-9) affirmed.

Petitioner contends here, as he did below, that the Fifth and Sixth Amendments, and the Army regulations, require that he be afforded a full evidentiary hearing to establish his excuse for unauthorized departure from active training, and that he be given a similar hearing with respect to his claim for medical

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[1] Petitioner's entry upon active duty has been stayed pending final disposition of the present suit.

discharge. These arguments were carefully considered and properly rejected by both courts below.

1. Petitioner's claim that the Constitution guarantees him a full evidentiary hearing prior to issuance of involuntary activation orders is not well taken. The courts of appeals have uniformly held in the present context that, in affording a reservist the right to submit documentary evidence on his behalf and to appeal an adverse decision administratively—as was admittedly the case here—the procedures prescribed by Army Regulation AR 135-91 satisfy constitutional standards of due process. *O'Mara* v. *Zebrowski*, 447 F.2d 1085, 1090 (C.A. 3); *Antonuk* v. *United States*, 445 F.2d 592, 594-595 (C.A. 6); *Ansted* v. *Resor*, 437 F.2d 1020, 1023-1024 (C.A. 7), certiorari denied, 404 U.S. 827. See also, *Hickey* v. *Secretary of the Army*, 320 F. Supp. 1241, 1243-1246 (D. Mass); *Brown* v. *McNamara*, 263 F. Supp. 686, 691 (D. N.J.), affirmed, 387 F.2d 150 (C.A. 3), certiorari denied, 390 U.S. 1005.

2. Army Regulation 135-91 imposes no greater requirement. It provides that, upon the failure of a reservist to complete annual training, the unit commander shall request issuance of active duty orders once he has determined that the reservist "was aware of the training termination date, and that no emergency or cogent reasons existed" for the reservist's early departure (AR 135-91, para. 11).

This is the procedure that was followed here. After an investigation, the unit commander determined that a call-up request should issue; on No-

vember 27, 1970, the request was approved by the area commander, First Army Headquarters (Pet. App. 12; AR 135-91, para. 14(a)). At no time did petitioner dispute that he was aware of the training termination date and that he had departed six days in advance of that date. He sought, instead, to excuse his early departure on the ground of emotional disturbance,[2] although no documentation supporting the claim was presented to his unit commander.

It was not until after the area commander's approval of his activation that petitioner, on being advised of his right to an administrative appeal (AR 135-91, para. 14(g)(1)) first submitted, on December 8, 1970, a private physician's psychiatric report in support of his claimed psychiatric difficulties. In accordance with AR 135-91, para. 20(b), the new information was forwarded by the unit commander to a Delay Appeal Board convened to pass on petitioner's appeal. Following its consideration of petitioner's file, including the additional documentary evidence that had been furnished, the Board disapproved the appeal on March 12, 1971.

Petitioner was thus accorded all the procedural safeguards prescribed by AR 135-91.[3] The fact that

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[2] The claim for medical discharge was, as we indicated, premised on the same ground.

[3] Petitioner's assertion that the procedures set forth in AR 15-6 should have been followed in this case is fully answered by the court below (Pet. App. 8-9). Moreover, the cross-reference in AR 135-91, para. 20(e) to AR 15-6 was specific-

the Delay Appeal Board declined to accept the claim of psychiatric disturbance as a legitimate excuse for petitioner's unauthorized early departure from active training does not warrant the relief he now requests. It was not obliged to do so. See *Byrne* v. *Resor*, 412 F.2d 774 (C.A. 3). Indeed, the psychiatric examination of petitioner ordered *sua sponte* by the district court failed to disclose "psychiatric problems which were so apparent that discharge would immediately be ordered" (Pet. App. 15).

3. Petitioner also contends that the Army should not have deferred passing on his request for a medical discharge until after his entry upon active duty. He relies on paragraph IV C of DoD 1215.13 (Pet. App. 7, n. 2), which provides that reservists who are unable to participate satisfactorily in their units, and are otherwise "eligible" for discharge from the reserve components, "will, upon application, be discharged."

But, as the court below pointed out (Pet. App. 7), the discharge exception of paragraph IV C does not pertain to "being *called* to active duty"; it is "an exception from *service* on active duty." Each reservist issued activation orders is required to undergo a medical examination at the Army reception station. The court below construed the directive (DoD 1215.13) as requiring that the Army physical be the point in time when reservists' requests for medical

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ally deleted on November 13, 1970, almost a full month before petitioner filed an administrative appeal. See Appendix *infra*, p. 7.

discharge are to be finally decided. This construction is supported by the language of the directive and is wholly consistent with the interpretation long followed by the Army itself. There is thus no cause for further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

APPENDIX

November 13, 1970

1. Questions have been raised concerning the policy of not authorizing personal appearances before boards considering appeal of involuntary order to active duty for unsatisfactory participation.

2. In order to clarify the policy, paragraph 20e, AR 135-91, will be amended by printed change to read as follows:

"*e. Appeal Board.* The Commanding Officer, US Army Reserve Components Personnel Center, will convene an appeal board to determine findings and submit recommendations to him on denials of appeal of involuntary order to active duty submitted under this regulation. The board proceedings will be as prescribed by the Commanding Officer, US Army Reserve Components Personnel Center. The provisions of Army Regulation 15-6 will not be applicable to such proceedings."

3. The above provisions are effective immediately.

4. Request CNGB advise State AG's accordingly.

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